ARAB-MALAYSIAN FINANCE BHD

v.

SIVA SUBRAMANIAM APPUPILLAI

HIGH COURT MALAYA, KUALA LUMPUR
AZMEL MAAMOR J
[CIVIL APPEAL NO: R2-12-138-1996]
14 MAY 1999

CONTRACT: *Guarantee - Loan secured by charge and guarantee - Proceeds of sale of property not sufficient to settle loan amount - Whether guarantor's liability limited to outstanding balance as at date of sale of property - Whether financier can only take into account outstanding balance as of date of sale of property - National Land Code 1965, s. 268(1)(c)*

CONTRACT: *Guarantee - Variation - Variation in basis of interest from yearly rest to daily rest - Whether such variation ought not to be allowed although beneficial to guarantor - Whether such variation raises a triable issue to disallow application for summary judgment by financier*

CONTRACT: *Guarantee - Conclusive evidence clause - Guarantor executed guarantee agreement containing such clause - Whether guarantor cannot dispute amount stated in final account*

This was an appeal against the dismissal of the appellant's application for summary judgment. The appellant had disbursed a loan to one Pala Krishnan ('the borrower') for the purchase of a landed property. The said property was charged to the appellant and the respondent stood as guarantor to the said facility. A guarantee document ('the guarantee') containing a conclusive evidence clause was executed by the respondent. The borrower defaulted in repaying the facility and thus the said property was auctioned. However, there remained an outstanding balance after the sale of the said property. The respondent failed to settle this amount despite the appellant demanding the outstanding amount. The appellant proceeded to bring an action to recover the outstanding balance and subsequently applied for summary judgment. The Sessions Court dismissed the appellant's application. The grounds successfully raised to resist the appellant's application were, *inter alia*, that it was wrong for the appellant to vary the basis of interest from yearly rest to daily rest since the guarantee stated the basis of interest to be on yearly rest, and that the appellant had taken into account the outstanding balance on a date other than the date of the sale of the said property thereby contravening s. 268(1)(c) of the National Land Code 1965 ('the NLC').

Held:

[1] While it is true that the guarantee states that the basis of interest was on yearly rest, to change it to be on daily rest would not be prejudicial to the respondent. On the contrary, changing the interest from yearly to daily rest would be advantageous to the respondent and the borrower. Any change of basis of interest for the better, from the respondent's point of view, should not be used as a ground to disallow the appellant's application.

[2] The words "at the time of the sale" found in s. 268(1)(c) of the NLC refers to the charge that exists at the time of the sale and does not refer to the payment of the purchase price. This is because it would not be possible to make payment at the time of the sale of the auctioned property since the proceeds of the sale cannot be obtained on the same date. It could not have been the intention of the legislature in enacting s. 268(1)(c) of the NLC to say that the deduction of the debt from the proceeds of the auctioned property must be made on the date of the sale of the said property because the proceeds of sale of the auctioned property cannot be realised on the date of sale. Therefore, s. 268(1)(c) of the NLC did not apply to the instant case.

[3] The appellant had produced a statement of account showing the amount outstanding. In the light of the conclusive evidence clause in the guarantee, it would not be open for the respondent to dispute the amount as stated by the appellant in the final account.

[Appeal allowed.]

Legislation referred to:
National Land Code 1965, s. 268(1)(c)
Subordinate Courts Rules 1980, O. 26A

For the appellant - Suria Doshi; M/s BH Gan, Nor & Kim
For the respondent - Saran Singh; M/s Saran Singh & Co

Reported by S Dharmendran

JUDGMENT

Azmel Maamor J:

This is an appeal against the decision of the Sessions Court judge dismissing the plaintiff's application for a summary judgment under O. 26A of the Subordinate Court Rules 1980.

On 14 January 1986 the appellant/plaintiff had offered one Pala Krishnan Appu Pillai who had accepted the offer a financial facility amounting to RM107,000 for the purchase of a landed property. One of the conditions of the said facility was the furnishing of a guarantor. The respondent had agreed to be the guarantor to the said facility. This is reflected in the guarantee document executed by the respondent dated 25 January 1986. The said property was also charged to the appellant. Because the borrower had committed default in repayment of the said facility the appellant took steps to auction the said property as so provided and allowed under the terms of the offer. However after the sale of the said property there remained an outstanding balance of RM77,753.28.

In accordance with the provisions of the said guarantee document the appellant through their solicitors demanded the outstanding amount from the respondent, the guarantor to the said facility. But the respondent failed to settle the amount. As such the appellant proceeded to bring an action to recover the said sum to court on 13 May 1993. The respondent filed his defence on 20 July 1993. On 20 January 1994 the appellant made an application under O. 26A of the Rules of the Subordinate Courts 1980 for a summary judgment on the ground that the defence had not shown any plausible defence to the plaintiff's claim.

At the hearing before the Sessions Court judge the defendant argued that there were three issues that required full hearing and as such the plaintiff's application should be refused. Firstly, there was undue delay on the part of the plaintiff in filing this application, a period of more than six months from the date the defence was filed. Secondly, in the computation of the interest imposed, the appellant, instead of using **yearly rate** had used **daily rate.** Thirdly s. 268(1)(c) of the National Land Code had not been complied in determining the outstanding amount claimed by the plaintiff.

The Sessions Court judge in her judgment had dismissed the first issue on delay because she was quite satisfied with the explanation given by the appellant in respect of the delay in filing the application. The explanation was contained in the supporting affidavit by Lau Kean Huat dated 14 December 1993. The appellant had to wait until the completion of the auction of the said property and receiving of the proceeds of sale of the said property. The learned Sessions Court judge in her grounds of judgment said:

> Berkaitan dengan isu kelewatan saya menerima penjelasan yang telah diberikan. Tambahan pula kelewatan tersebut bukan keterlaluan.

I agree with her decision in respect of this first issue.

With regard to the second issue the learned Sessions Court judge in her grounds of judgment said:

> Berkaitan dengan isu kiraan faedah saya dapati bahawa berdasarkan Perjanjian Guarantee di Exhibit A kandungan (8), pihak Plaintif sememangnya mempunyai hak untuk mengubah kadar dari 13.5% setahun pada masa Guarantee itu ditandatangani kepada apa-apa kadar mengikut budibicara Plaintif. Namun demikian saya dapati bahawa asas pengiraan tersebut iaitu secara kiraan tahunan. Walaubagaimanapun tuntutan Plaintif dalam Saman dan Penyata Tuntutan adalah pada kiraan harian dan bukan secara kiraan tahunan seperti dalam Gerenti tersebut.

In respect of this second issue the learned Sessions Court judge's judgment had two parts. The first part deals with the right of the appellant to vary interest rate from 13.5% to any other rate at the absolute discretion of the appellant. The right of the appellant to vary interest rate had been agreed upon by the respondent as contained in cl. 1 of the guarantee, which reads:

> To pay and satisfy you on demand all every and part of the said Loan and interest prescribed therein (hereinafter "the Prescribed Rate") which said Prescribed Rate consists of the Base Lending Rate plus a margin of interest of Two percent (2%) per annum above the Base Lending Rate which said *Base Lending Rate is at present thirteen and a half percent (13.5%) per annum on yearly rests or such other rates as may from time to time be stipulated by you in your absolute discretion* which is now or shall at any time be owing or remain due and unpaid to you from the Borrower together with any commission and other expenses and all costs charges and expenses which you may incur in enforcing or seeking to obtain payment of all or any part of the moneys hereby guaranteed and to make good any default by the Borrower or his estate in payment of the said Loan or any part thereof and all interests thereon. (emphasis added.)

Therefore on the basis of this cl. 1 of the said guarantee the respondent could not now question the right of the appellant to vary the interest rate which is exercisable at its absolute discretion. The Sessions Court judge had rightly concluded that the appellant had the right to vary the interest rate to any other rate at its absolute discretion. I have no problem with this part of her decision.

As to the second part of her decision the Sessions Court judge ruled that it was wrong for the appellant to vary the basis of interest from yearly rest to daily rest. On this issue, while it is true that the guarantee states that the basis of interest was on yearly rest but to change it to be on daily rest would not be prejudicial to the respondent. As a matter of fact changing the interest from yearly to daily rest would be advantageous to the respondent and the borrower. Therefore, any change of basis of interest for the better from the respondent's point of view, should not be used as a ground to disallow the appellant's application. I therefore disagree with the decision of the Sessions Court judge in respect of this issue as the change of interest from yearly to daily rest would cause no prejudice to the respondent.

The third and final issue raised by the respondent was that the appellant had taken into account the outstanding balance on a date other than the date of the sale of the property in question, thereby contravening the provision of s. 268(1)(c) of the National Land Code. Section 268(1) reads as follows:

> 268. Application for purchase money.
>
> (1) The purchase money arising on any sale under this Chapter shall be applied as follows -
>
> (a) firstly, in the payment of rent to the State Authority or the lessor (according as the charge was a charge of land or of a lease) and, so far as no person other than the chargor was responsible therefor, any other outgoings payable to the State Authority or any local authority;
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> (b) secondly, in the payment of the expenses (as certified by the Registrar of the Court or Land Administrator, as the case may be) incurred in connection with the making and carrying into effect, of the order for sale;
>
> (c) thirdly, in the payment to the chargee of the total amount due under the charge **at the time of the sale:**
>
> (d) fourthly, in the case of a charge to secure the payment of an annuity or other periodic sum, in accordance with any provision for the satisfaction of payments subsequently falling due included therein pursuant to paragraph (b) of sub-section (2) of section 242; and
>
> (e) fifthly, in the payment off of subsequent charges, if any, in the order of their priority. (emphasis added.)

In my view the words "**at the time of the sale**" found in cl. (c) of sub-s. (1) of s. 268 of the National Land Code refers to the **charge** that exists at the time of the sale and does not refer to the **payment** of the purchase money. I say this because it would not be possible to make payment at the time of the sale of the auctioned property, because the proceeds of the sale cannot be obtained on the same date. In my view Parliament do not and would not pass any legislation which is not capable of performance. Therefore it could not be the intention of the legislature in enacting s. 268(1)(c) of the National Land Code to say that deduction of debt from auctioned property must be made on the date of the sale of the said property because the proceeds of sale of the auctioned property cannot be realised on the date of sale. One cannot make any deduction of debt until money is **actually** received. To insist on so doing would be most unfair to the appellant. I therefore conclude that the words "at the time of the sale" in s. 268(1)(c) of the National Land Code refers to the charge that exists at the time of the sale and does not mean the time when the payment of the purchase price be deducted from the outstanding balance.

In the light of the interpretation of s. 268(1)(c) of the National Land Code I am of the view that this provision does not apply to this case. I therefore disagree with the decision of the learned Sessions Court Judge.

In addition to that the guarantee document provides for a Conclusive Evidence Clause to which the respondent had agreed to be bound. Clause 10 of the guarantee reads:

> 10. Any account settled or stated by or between you and the Borrower or admitted by or on behalf of the Borrower may be adduced by you and shall in that case be accepted by me/us or my/our representatives as conclusive evidence that the balance or amount thereby appearing is due from the Borrower to you.

The appellant had produced the statement of account (p. 66-67 appeal record) showing the amount outstanding as of 30 June 1992 at RM77,753.28. In the light of the provision of cl. 10 of the said guarantee it would not be open for the respondent to dispute the amount as stated by the appellant in the final account.

After having considered the whole circumstances of this case I was unable to find any triable issue raised by the respondent in respect of the application made by the appellant under O. 26A of the Rules of the Subordinate Courts 1980. I therefore disagreed with the decision of the learned Sessions Court judge in rejecting the plaintiff's application. In the circumstances the appeal was allowed with costs.